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**No. 87-1640**

Supreme Court, U.S.  
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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1987**

**THE STATE OF TEXAS,  
PETITIONER**

**v.**

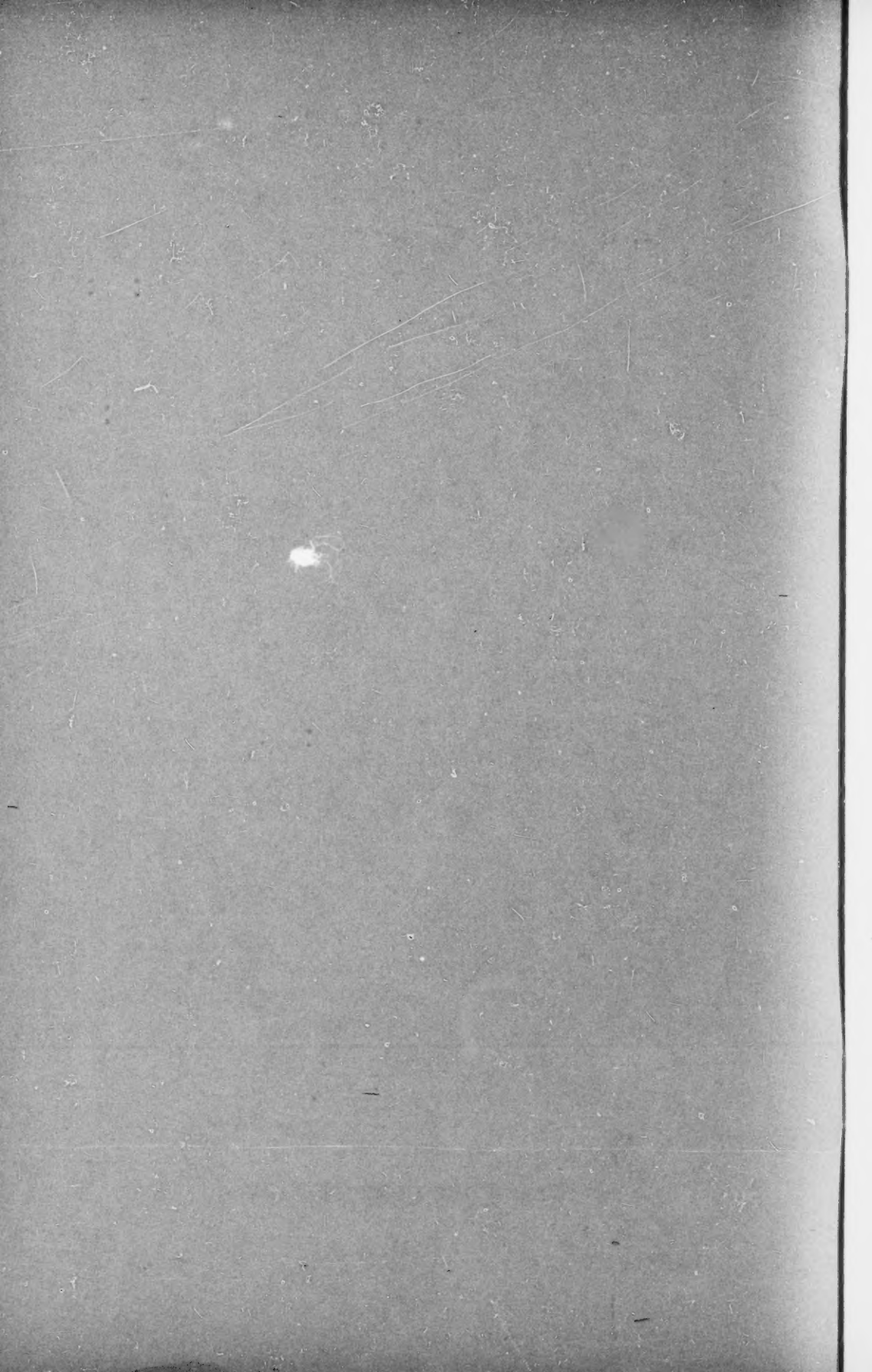
**DAVID VANCOURTLANDT CROSBY,  
RESPONDENT**

**Opposition to Petition for Writ of Certiorari  
to the Texas Court of Criminal Appeals**

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## **Questions Presented**

I. Should this Court review a decision of a state court of criminal appeals reversing a conviction where the state court based its decision on its interpretation of state statutory law, analysis of state court decisions, and upon a conclusion that a reversal was mandated by its own state constitution?

II. Should this Court review a decision of a state court of criminal appeals reversing a conviction where the state court's analysis of federal law — which was not even dispositive of the case — consisted of an unremarkable application of well-established Fourth Amendment principles to the particular facts of the case?



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Texas Alcoholic Beverage Code (T.A.B.C.)

§ 101.04	4, 5, 6, 13
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**Statement of Case**

The State of Texas acknowledges in its formulation of the Questions Presented to this Court that the decision of the Texas Court of Criminal Appeals, as well as the instant petition to this Court, turns on an interpretation of a state regulatory statute.<sup>1</sup> As even a cursory reading of the opinion below makes

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<sup>1</sup>For purposes of the instant Brief in Opposition to the State's Petition for Writ of Certiorari, Respondent does not quarrel with the Petitioner's rendition of the facts of the instant dispute. Were certiorari to be granted, Respondent would challenge the State's rendition of the facts.

clear, the decision of the Texas Court of Criminal Appeals — that the search of Respondent's dressing room violated Art. I., § 9 of the Texas Constitution, as well as the Fourth and Fourteenth Amendments to the United States Constitution — rested upon its analysis and application of an involved state regulatory statute, as well as on a thorough and careful review of state court decisions. Indeed, even the State, in its instant petition, must devote a majority of its analysis to rehashing, in this clearly improper forum, its statutory argument. *See, e.g.,* Pet. at 14-19; 26-32.<sup>2</sup>

The State asserts, as it did in the court below, that its warrantless search of Respondent's dressing room was justified by the existence of a state statute regulating establishments that sell alcoholic beverages. The linchpin of Petitioner's argument — a linchpin that rests exclusively on statutory interpretation — is whether the search of Respondent's dressing room was conducted *pursuant to*, and *authorized by*, the regulatory scheme. The Texas Court of Criminal Appeals found, upon a careful and thoughtful application of the statute to the facts of this case, that Office Rinebarger's search was not conducted pursuant to — and thus could not, by definition, be justified by — the Texas Alcoholic Beverage Code (T.A.B.C.).<sup>3</sup> Absent

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<sup>2</sup> Respondent uses the following abbreviations throughout: "Pet." for the State's Petition for Writ of Certiorari; and "App." for the State's Appendix to Petition for Writ of Certiorari.

<sup>3</sup> One need only read the lower court's thoughtful opinion to appreciate the misleading nature of the State's petition. Petitioner would like this Court to believe that the opinion below turned on an undefined, yet anomalous interpretation of the Fourth Amendment. Nothing could be further from the truth. As the quote below indicates, the instant case turned on the court's careful analysis of the scope and breadth of the state's regulatory scheme:

We find that from the record that Officer Rinebarger acted beyond the scope of T.A.B.C. § 101.04, as the search of Crosby's dressing room was not related to detecting a violation of the Texas Alcoholic

this link in its argument, which the State attempts to avoid throughout its brief. Petitioner's claim is meritless.

However, even were this Court to reach Petitioner's federal law claim, there would be no valid basis for granting certiorari in this case. Although the State asserts, in grandiose terms, that the Texas Court of Criminal Appeals "has decided an important federal question of first impression" (Pet. 12), and that the court decided this question "in conflict with applicable decisions of this Court" (Pet. 32), the fact is that the court below did no such thing. As will be discussed *infra*, an examination of the decision of the Texas Court of Criminal Appeals reveals that it made no decisions contrary to the decisions of this Court, nor did it expound new standards to govern the application of federal law. Rather, the court below took the standards and principles of federal law that it found in decisions of this Court, as well as standards and principles of state law, and properly applied them to the facts of this case.

Although the Texas Court of Criminal Appeals reversed his conviction, Respondent has already served his prison time and has been paroled. The State is now asking this Court to reach out and reinstate a conviction that the highest court in the State of Texas, interpreting state statutes and applying state court decisions, has determined violated Respondent's rights under both the state and federal constitutions. For the reasons discussed below, the petition for writ of certiorari should be denied.

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Beverage Code, rather Rinebarger attempted to use the Code as a subterfuge to conduct an exploratory search.

## Argument

### I. THE TEXAS COURT OF CRIMINAL APPEALS OPINION TURNED ON ITS INTERPRETATION OF A STATE REGULATORY STATUTE AND APPLICATION OF STATE COURT OPINIONS.

Although the State asserts that the instant petition raises important federal questions of first impression, a review of its principal argument reveals that the Petitioner seeks only to relitigate questions of pure statutory interpretation. In essence, the Petitioner simply disagrees with the State court's interpretation of the scope of a state regulatory statute: Petitioner asserts that the search of Respondent's dressing room fell within the purview of the Texas Alcohol Beverage Code,<sup>4</sup> a fundamental point on which the Texas Court of Criminal Appeals disagreed. The State sought to justify its search of Respondent's dressing room on the basis of a state statute (App. 24); the court held that the search was "beyond the legitimate scope of any inspection allowed by T.A.B.C. § 101.04." (App. 24.) By ignoring the thrust of the lower court opinion, and selectively discussing its analysis, the State seeks to transform this case of statutory analysis into a constitutional issue. A review of the State's brief, and the decision below, mandates a different conclusion, and a denial of the instant petition.

The State has consistently argued, as it does in the instant petition, that § 101.04 of the T.A.B.C. justified the search of Respondent's dressing room; the State writes that "[t]hroughout the appellate process, [it] has contended that Crosby's expecta-

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<sup>4</sup>Respondent, David Crosby, had contracted with a Dallas night club to perform on the night of April 12, 1982. The contract between Respondent and the club provided that Respondent was to be furnished with "a private dressing room secluded from the public" (App. 3). The club was licensed to sell alcoholic beverages by the Texas Alcohol Beverage Commission (T.A.B.C.); pursuant to the T.A.B.C., the "holder" of a liquor license consents to an investigation or inspection by a peace officer of the premises "for the purpose of performing any duty imposed by this code." T.A.B.C. § 101.04.

tion of privacy must be affected by the regulatory statute" (Pet. 17). The State concedes, as it must, that the court below explicitly found that the search did not fall within the regulatory scheme.<sup>5</sup> However, the State seeks, in this petition, to relitigate the very issue of whether the instant search was conducted pursuant to the statute — whether the search was clothed with the shield of the regulation, thus trumping Respondent's expectation of privacy. The State court, in a thorough and thoughtful exegesis on state statutory and case law, resoundingly rejected this precise state law claim.

The Texas Court of Criminal Appeals specifically and unequivocally held that the peace officer's action in entering the Respondent's dressing room was beyond the scope of any inspection authorized by the Texas Alcoholic Beverage Code.<sup>6</sup> The court below initially observed that T.A.B.C. § 101.04 grants, to certain State agents, the authority to enter a licensed premise at any time in order to "conduct an investigation or inspect the premises for the purpose of performing any duty imposed by this code" (App. 29). As the court noted, the general duty of a peace officer under the T.A.B.C. is to "enforce the provisions of this code and cooperate with and assist the commission in detecting violations and apprehending offenders" (App. 30). As provided by the statute, the "scope"

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<sup>5</sup>Petitioner notes that the lower court specifically held:

[T]he licensee's expectation of privacy was waived only as to investigations performed pursuant to the regulatory scheme of the statute. After considering the police officer's subjective reasons for entering the room, the Court concluded that the entry was for the purpose of conducting a general, exploratory search and not for the purpose of investigating for liquor law violations.

(Pet. 18.)

<sup>6</sup>Respondent at no point challenged the constitutionality of the relevant Code provisions; rather he simply challenged their applicability to him — an interpretation that was upheld by the highest court in Texas. *See, e.g.*, App. 24.

of the search must be for the purpose of “performing a duty imposed by the Code.” T.A.B.C. § 101.04.

Turning to the facts of the instant case, the court found that the record reflected that Officer Rinebarger’s inspection of Respondent’s dressing room was *not* justified by the regulatory statute — that he was not, in conducting the search, performing a duty imposed by the code. It was apparent, from a careful inspection of the record, that the officer was not seeking to investigate for the detection of *any* violation of the T.A.B.C.; rather “the officer merely wanted to go where he had been told he could not, because his curiosity had been aroused when appellant’s sentry informed him that he could not enter the dressing room” (App. 33).<sup>7</sup> Clearly, this Court should not disturb this finding by the highest court of the State.<sup>8</sup>

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<sup>7</sup>The record reveals the following exchange on cross-examination, by Mr. Ethington [Defense Attorney]:

- Q. Tell the Court, please, why you went around him, everything you can remember about why.
- A. It raised my curiosity as to why he [the black man guarding the door] didn’t want me to go in there.
- Q. You were curious then?
- A. Yes, sir.
- Q. Can you give us any other indications other than curiosity over and above him saying you can’t go in there?
- A. Being that I was in uniform I felt like there might be a law of the State of Texas being violated inside that curtain.
- Q. Based on you being a police officer and him saying you can’t go in there?
- A. Yes, sir.
- Q. Is there any other thing that you can articulate for us that entered into that decision for you to go in, anything at all?
- A. No, sir.

(App. 31-33.)

<sup>8</sup>This Court will defer to the interpretation of state law announced by the highest court of a state, “even where a more reasonable interpretation is

One comes away from the State's instant petition with the impression that the Petitioner has not even read the lower court's opinion. The State actually asserts that "[t]he analysis of the Court of Criminal Appeals completely ignores the existence of the state statute closely regulating this state-licensed liquor establishment by providing for warrantless inspection of the premises and the effect it should fairly have on the reasonableness of Crosby's expectation of privacy." (Pet. 26-27.) Even a cursory reading of the lower court's opinion demonstrates that the Texas Court of Criminal Appeals devoted the vast majority of its analysis to the very issue of the applicability of the Texas regulatory statute to the constitutionality of the search. *See, e.g.*, App. 29-42.<sup>9</sup> While the State professes concern that the Petitioner has somehow, by his contract, attempted to "override" the regulatory scheme, the State completely ignores the central thrust of the Texas court's opinion — that the searching authorities had used the statute as a pretext for the challenged search. Ironically, the Petitioner asserts that the lower court opinion affords individuals "almost unlimited opportunity for subterfuge and undermining of the regulatory statute" (Pet. 29) — ignoring the fact that the lower court explicitly found that the Petitioner, rather than the Respondent, attempted "to use the Code as a subterfuge to conduct an exploratory search." (App. 36-37.)

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apparent, *see, e.g.*, *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974), a contrary construction might save a state statute from constitutional invalidity, *see, e.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837, n. 9 (1978), or it appears that the state court has attributed an unusually inflexible command to its legislature, *see, e.g.*, *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688-689 (1959)."  
*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 485 n.9 (1981) (Stevens, J., dissenting).

<sup>9</sup>The court specifically stated, for instance, that a central question posed by the instant case was the expectation of privacy of "third parties who are legally on the premises . . . such as appellant" under "the statutory scheme set out in the Texas Alcohol Beverage Code" (App. 15).

Regardless of what light the State now seeks to cast its argument, at bottom the State simply quarrels with the Texas court's interpretation of its regulatory statute. The State's petition, in effect, asks this Court to resolve questions of statutory interpretation differently than did the Texas Court of Criminal Appeals. Certiorari is clearly an inappropriate vehicle through which to challenge the interpretation of state law announced by the highest court in the state.

II. THE FEDERAL LAW ANALYSIS BELOW IS AN UNREMARKABLE APPLICATION OF WELL-ESTABLISHED FOURTH AMENDMENT PRINCIPLES TO THE PARTICULAR FACTS OF THIS CASE.

The test applied by the Court of Criminal Appeals to determine whether Respondent had a legitimate expectation of privacy, under Art. I, § 9 of the Texas Constitution as well as the Fourth Amendment to the United States Constitution, was entirely consistent with well-established Fourth Amendment principles adopted by this Court. Petitioner concedes, as it must, that the lower court applied the proper test (Pet. 20), as it adopted the test announced by this Court in *Katz v. United States*, 389 U.S. 347 (1967), and reaffirmed in *Smith v. Maryland*, 442 U.S. 735 (1979). According to the court below:

The litmus for determining existence of a legitimate expectation of privacy as to a particular accused is two-fold: first, did he exhibit by his conduct "an actual (subjective) expectation of privacy[:]" and second, if he did, was the subjective expectation "one that society is prepared to recognize as 'reasonable.'" *Smith v. Maryland*, 442 U.S. at 740.

(App. 18, quoting *Chapa v. State*, 729 S.W.2d 723, 727 (Tex.Crim.App. 1987)).

The lower court proceeded to engage in a thoroughly unremarkable, flawless application of this two-part test. The State acknowledges, in the instant petition, that the first part of the analysis was, unquestionably, met (Pet. 21). As the court below noted,

The record clearly establishes that Cardi's was contractually obligated to provide appellant with a dressing room in a specific area of the club, to be set aside for his personal use. According to the record, this dressing room was located to the side of the stage and the entrance demarcated by the use of a curtain, which when drawn completely shielded anyone from viewing the inside of the room. In addition to contracting with Cardi's for this dressing room, the appellant took the precaution of placing a sentry in front of the drawn curtain, whose obvious duties entailed excluding unwanted intruders from invading the confines of the dressing area, albeit in the case of Officer Rinebarger unsuccessfully. Rinebarger was himself told by the individual posted outside the drawn curtain that he could not go into the room, although Rinebarger chose to ignore these instructions, the intent was to exclude Rinebarger from entering. Rinebarger acknowledged that he could not see into the dressing room until he pushed aside the posted guard, drew back the curtain and entered the room.

(App. 18-19.)

Petitioner argues, however, that the provisions of the Texas Alcoholic Beverage Code nullified the Respondent's expectation of privacy in the dressing room. As discussed *supra*, the

State court resoundingly rejected this interpretation of the T.A.B.C. — holding that the statute did not cover the officer's search of Respondent's dressing room.

Absent any justification that might have been afforded by the regulatory statute — a justification, under the facts of this case, which the State court concluded was a "subterfuge" — the court below was simply left with the question of whether the second prong of the *Katz/Smith* test had been met. In answering this question, the Texas court engaged in the following proper, unremarkable, and clearly correct analysis:

In the case at bar the appellant had contracted for a private dressing room which Cardi's agreed and did provide. It was shielded from public view by a closed curtain, and appellant took the additional step of placing his own private sentry outside the curtain in an attempt to keep unwanted intruders from entering the dressing room. From viewing the facts of this case it is a reasonable conclusion that appellant at least possessed and had the power to exercise a significant degree of control over the dressing room and to exclude unwanted intruders and members of the general public from the area. . . . "Every entertainer needs a dressing room, not only for clothing and make-up purposes, but so that they might have a few moments of relaxation away from the eyes of the public and demands of the audience. *Crosby v. State, supra* (J. Howell, dissenting)." Appellant was entitled "to the modicum of privacy . . ." *Buchanan v. State, supra*, the dressing room and its design afforded. Appellant manifested his subjective expectation that at the very minimum his dressing room was to provide him the privacy in a secluded area with the concomitant right to exclude interlopers

from the area. We believe that in light of contemporary societal standards society is prepared to recognize appellant's subjective expectation of privacy as both "reasonable" and "justifiable" considering of the facts of this particular case.

(App. 39-41.)

Petitioner clearly misreads the Texas court's opinion when it implies that the sole basis for the court's finding of the second prong lay in Respondent's "property" interest in the dressing room. Petitioner boldly asserts that "[t]he strength of one's subjective expectation of privacy arising out of property rights cannot convert an unreasonable expectation of privacy into a reasonable expectation of privacy protected by the Fourth Amendment." (Pet. 22.) Petitioner's assertion proves too much. The State conveniently ignores the fact that the Texas Court of Criminal Appeals explicitly recognized that society had recognized Respondent's expectations of privacy as reasonable. Far from being "unreasonable," Respondent's expectation of privacy in his closed dressing room was, according to the court, one that society was "prepared to recognize" as "'reasonable' and 'justifiable'" — an expectation based on the "needs" of entertainers to have "a few moments of relaxation away from the eyes of the public and demands of the audience." (App. 40-41.)<sup>10</sup>

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<sup>10</sup> Similarly, Petitioner's citation to *Oliver v. United States*, 466 U.S. 170 (1984) is grossly unfair. The decision in *Oliver* turned on the "open fields" doctrine, and the determination that there is no societal interest furthered in protecting privacy of activities, such as cultivation of crops, that occur in such areas. That society will not recognize privacy expectations in open fields — due, in large degree, to the practical consideration that these lands are invariably accessible to the public — does not, in any way, lessen the validity of the lower court's finding that society is willing to recognize the reasonableness of an

The court also observed that even if it were to have found that the Texas regulations covered the search — which they did not — an independent ground nonetheless existed for finding that appellant had a reasonable expectation of privacy in his dressing room. The court observed, applying reasoning fully consistent with this Court's decision in *Ybarra v. Illinois*, 444 U.S. 85 (1979), that the user of licensed premises stands in a different posture than the actual licensee. In *Ybarra*, a warrant had been issued to search the premises of a tavern; while executing the warrant, the police commenced a "cursory search for weapons" of the patrons which ultimately led to the discovery of heroin on Ybarra. "The State of Illinois had relied upon a statute, in justification of the search, that authorized officers ". . . to detain and search any person found on the premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant." *Id.* at 87. In holding the search violative of the defendant's Fourth Amendment rights, this Court observed, in language equally applicable to the instant case:

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . Where the standard is probable cause, a search or seizure of a person must be

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expectation of privacy in a private dressing room. By analogy, the court below observed that courts have recognized as reasonable similar expectations of privacy in restrooms located in public areas (App. 37, citing *Buchanan v. State*, 471 S.W.2d 401 (Tex. Cr. App. 1971)).

supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. . . .

Each patron who walked into the Aurora Tap Tavern . . . was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by [the bartender]. Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and search [the bartender], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.

*Id.* at 91-92 (citations and footnotes omitted).

As the court below observed, the "State's basic contention is that because of T.A.B.C. § 101.04 . . . appellant was simply in a 'place' which could not afford him an inherent opportunity for privacy." (App. 47.) However, what the State continues to ignore is the fact that "the expectation of privacy that Cardi's abandoned when it accepted a license under the Texas Alcoholic Beverage Code and thus authorized warrantless inspections of the premises was abandoned only insofar as it related to furtherance of the regulatory scheme detailed by the Texas Alcoholic Beverage Code. Cardi's did not by accepting a liquor license waive all of its rights under the Fourth Amendment." (App. 48.) Since the search was not conducted

pursuant to the regulations of the industry, it was not justified by the statute. The court held that in the absence of a search warrant, consent, or probable cause — none of which existed in the instant case — the search was, under accepted and well-established standards of constitutional jurisprudence, unreasonable under Article I, § 9 of the the Texas Constitution and the Fourth Amendment to the United States Constitution.

Finally, the State, with one eye apparently closed to the findings of the court below, asserts that the “objective good faith” of Officer Rinebarger in entering the Respondent’s dressing room mandates reversal of the court below (Pet. 36). The Texas Court of Criminal Appeals, however, specifically *rejected* such a good faith argument on its facts — finding that “Rinebarger attempted to use the Code as a subterfuge to conduct an exploratory search.” (App. 36-37.) Similarly, the State’s professed concern that the lower court ignored the principal purpose of the exclusionary rule — deterring future unlawful conduct rather than satisfying the personal right of the party aggrieved — is dispelled by even the most cursory reading of the Texas court’s opinion. It would be difficult to imagine a *more* prospective concern than that expressed by the court below:

If we were to judge this record in a contrary fashion we would be providing peace officers of this state with the power and authority to conduct general, exploratory searches. This we will not, nor can we constitutionally, do.

(App. 34.)

### Conclusion

The State's quarrel with the lower court's decision boils down to a disagreement over state statutory interpretation and findings of fact. The Texas Court of Criminal Appeals' decision reversing Respondent's conviction was based on its interpretation and application of a state regulatory statute, state law precedent, a state constitution and, at most, an unquestionably correct application of well-settled search and seizure jurisprudence under both state and federal constitutional law. Its decision should be deemed final under principles of federalism, constitutional restraint, and fairness. Accordingly, Respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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